U.S. Department of Labor **Office of Administrative Law Judges**
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 01 April 2003

In the Matter of

LLOYD RHINE
Claimant

Case No.: 1998-LHC-02090
OWCP No.: 14-126603

v.

STEVEDORING SERVICES OF AMERICA
Employer

and

HOMEPORT INSURANCE CO.
Carrier

and

ILWU-PMA WELFARE PLAN
Intervenor

Charles Rabinowitz, Esq.
Portland, OR
For the Claimant

John Dudrey, Esq.
Portland, OR
For the Employer/Carrier

Roland Katz, Esq.
San Francisco, CA
For the Intervenor

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation for permanent total disability arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*. (hereinafter "the Act"). A formal hearing was held in Portland, Oregon on November 28, 2001. The record closed on March 27, 2002 on receipt of the employer/carrier's ("employer's") reply brief.

Claimant contends that he cannot return to work as a longshoreman due to the effects of a work-related injury sustained on October 22, 1997. Employer argues that claimant's permanent disability is partial, not total, and that claimant's loss of wage-earning capacity is minimal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Background

The claimant is a 48 year old resident of Vancouver, Washington. He is a high school graduate. Prior to becoming a longshoreman, he worked primarily as a welder, ironworker and boilermaker (TR 142-43). In 1974, claimant injured his right knee in a motorcycle accident, which caused him to have surgery. He aggravated that injury during military service in 1975, which led to receiving a medical discharge from the service (EX 131, at 524). In 1985, he tore the anterior cruciate ligament in his right knee, and again he underwent surgery. He remained off work for nine months following that injury (*id*. at 525; EX 108, at 422). He had another operation on that knee in 1986 by Dr. Loch (EX 145, at 1066-67). In the report of that operation, Dr. Loch noted that claimant had all the cartilage in his knee removed; had no anterior crutiate ligament; and had arthritis in the knee (EX 145, at 1005-09). Claimant's treating physician at that time, Dr. Tilson, a board-certified orthopedic surgeon and occupational medicine specialist (EX 145, at 1064) who works for Kaiser Permanente,
placed claimant on restrictions of "no walking or standing over 30 minutes without a chance to sit; no sitting over 30 minutes without a chance to stretch and move; no repetitive squatting, kneeling or crawling. no [*sic*] repetitive change from sitting to standing position; no lifting or carrying over 35 [pounds]. Minimum stairs, ladders, rough or uneven ground." (EX 108, at 422) Dr. Tilson recommended that claimant find lighter work. He explained that these restrictions were imposed in order to prevent further progression of the widespread arthritis in his knee (EX 145, at 1011).

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[1]Citations to the record of this proceeding will be abbreviated as follows: CX – Claimant's Exhibit; EX – Employer's Exhibit; IE - Intervenor's Exhibit; TR – Hearing Transcript. Some documents are found in both the claimant's and employer's exhibits, but only one exhibit will be cited as the source for a finding of fact.

Employer's Exhibits 147-50 are comprised of about 5 ½ hours of surveillance videotapes. That I have failed to cite them in this decision is not because I did not view them. Unfortunately, I did. But they have little probative value.

Claimant tried to find lighter work through vocational retraining, but could not meet the academic demands of the program. So he went back to ironworking (TR 145-46). Then in 1988 he became a longshoreman (TR 142). After passing a physical examination, he began as a non-union casual worker. He became a B-registration longshoreman – a union job with higher seniority than casual work – in March, 1997, again passing a physical examination (TR 149-50). Despite not complying with Dr. Tilson's restrictions, claimant had no significant physical problems with his knees (EX 40, at 770-80; TR 151). Shortly after becoming a B-registration longshoreman, in April or May, 1997, claimant injured his right shoulder at work. This resulted in rotator cuff surgery (TR 152). He returned to work in October, 1997. Later that month, on October 22nd, he was working aboard ship as a holdsman tying down a load of logs when he was struck on his hard hat, left shoulder and arm by a very heavy cable (TR 153-55). Claimant was taken to Good Samaritan Hospital by ambulance (TR 156). X-rays were negative, and he was diagnosed with a severe left arm contusion. Pain medication was prescribed; claimant was told to put ice on the arm and keep his arm in a sling; and he was released (EX 11). The following day claimant went to his own health care provider, Kaiser Permanente, complaining of pain in his left elbow and upper back and neck (EX 12, at 40). At Kaiser Permanente, he came under the care of Dr. Craven. In addition to the contusion to the left arm which had been diagnosed in the emergency room, Dr. Craven diagnosed a strain to the cervical area and upper back (*id*. at 41). He seconded the emergency room's instructions, adding only a prescription for Naprosyn, and told claimant to return in five days. Claimant returned to Dr. Craven on October 27th. At this visit claimant was complaining of numbness going down his arm into his fingers and severe pain and tenderness in his neck (EX 13, at 44). X-rays of the humerus and cervical spine showed no fractures, but did show some arthritic changes at C5-6 (*id*.). Claimant was given a soft cervical collar and medication for neck spasms. He was kept off work, and was told to return in a week (*id*.). An MRI of the cervical spine done the next day showed multilevel degenerative disc disease but no evidence of a traumatic injury. It was also stated that "[n]o definite findings to explain the patient's left-sided symptoms are identified." (EX 14, at 48) On November 12, 1997, claimant was examined by Drs. Smith and Vessely on behalf of the carrier (EX 18). They diagnosed an acute cervical sprain/strain which they believed would resolve without surgery. They added that the treatment claimant was undergoing appeared to be appropriate (*id.*).

Claimant testified that he wore the cervical collar for three months (TR 157). He continued seeing Dr. Craven, who started claimant on physical therapy on November 18th, 1997 (EX 16-18). On November 20, 1997, claimant was seen by Dr. Harrison, a neurosurgeon, on referral from Dr. Craven (EX 20). Dr. Harrison was reluctant to make a diagnosis at that time because he did not have claimant's MRI. However, he did recommend physical therapy (*id*). Claimant returned to Dr. Harrison on November 26th with the MRI. Dr. Harrison noted that the MRI did not show anything which would cause problems on claimant's left side, and that he was not a surgical candidate (EX 22, at 78). He thought claimant's problems would resolve. Dr. Harrison saw claimant twice more, on December 8 (EX 23) and December 26, 1997 (EX 26). He

stated that claimant's radicular symptoms improved with the physical therapy, and that the therapy should continue (EX 26). He also proposed epidural steroid injections and a myelogram and CT scan if claimant did not improve further (*id.*). On December 30, 1997, Dr. Craven wrote that:

> He does seem to be improving, so I expect that this will probably resolve in about six weeks, and he should be able to return to regular duty in approximately four to six weeks.

(EX 27, at 106).

Claimant continued physical therapy and remained off work, progressing slowly. On March 3, 1998, Dr. Craven stated that the claimant had improved enough to return to work with restrictions. However, he pointed out that there are no modified duty jobs for a longshoreman, so he was keeping claimant off work for another four weeks (EX 35, at 155). Then on March 31, Dr. Craven noted claimant's lack of improvement since his previous visit. He stated that claimant had just seen Dr. Harrison, who recommended that claimant undergo a myelogram and an EMG study (EX 41, at 178; EX 43). Dr. Craven also stated that claimant was scheduled for epidural injections. Dr. Craven ordered a TENS unit for a 30-day trial, and also ordered that the EMG study recommended by Dr. Harrison be conducted (*id.*). He still wanted claimant to return to work under restrictions, but noted that if the union would inform him that there is no light duty available, he would again take the claimant off work (*id.* at 181). On April 14, 1998, after being informed by the union that light duty work is not available to longshoremen (EX 44), Dr. Craven again took claimant off duty (EX 47).

On May 1, 1998, despite noting that the claimant had only minimal improvement in the last month, Dr. Craven stated that "I think he is ready to go back to regular duty as a trial and he would like to try it. I released him for regular duty May 4th." (EX 48, at 208) Nevertheless, he scheduled claimant for an EMG study on May 6th which produced normal results except for a progression in claimant's bilateral carpel tunnel syndrome since a previous EMG in 1993 (EX 49, at 210).[2] Claimant did return to work on May 4, 1998 (TR 157-58). He was assigned to jobs as a millwright and gear locker, both of which require periods of heavy physical labor (TR 159-61). After working in these jobs his left arm would go numb and "tingly" (TR 161-62). On July 24, 1998, Dr. Craven restricted claimant from working as a millwright (EX 59, at 235). Claimant also worked as a sweeper and a master consoleman in grain elevators, hauled containers and drove cars off ships (TR 162-68). He was physically capable of performing these jobs.

On September 14, 1998, claimant reported to Dr. Craven that he was experiencing a new symptom – numbness of the left side of his face (EX 63, at 245). Dr. Craven ordered an MRI of claimant's head, and placed him on modified duty (*id.* at 247). The MRI did not indicate any

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[2]There is no contention that the carpal tunnel syndrome is work-related.

trauma from a head injury (EX 66, at 253). Nevertheless, this numbness on the left side of his face, jaw and tongue, accompanied by a metallic taste in claimant's mouth and sometimes with pain in his left arm, down his left side and into his chest, increased in frequency and severity (TR 173-75). Dr. Craven referred claimant to Dr. Mertens for a neurology consultation, and on October 2, 1998, Dr. Mertens diagnosed neck-tongue syndrome (EX 69). On October 19, 1998, following Dr. Mertens's examination, Dr. Craven changed claimant's restrictions. He noted that there are no light duty jobs as a longshoreman, in effect stating that claimant could not work (EX 70, at 266; *cf* CX 33). In fact, claimant had already stopped working, September 28th having been his last day (CX 15, at 92), although it is unclear why he stopped working at that time. His "diary" (CX 30) indicates that he was getting increasingly stiff and "tingly" at the end of September (*id*. at 387-88), but Dr. Craven did not take him off work when he saw the claimant on September 29th (*see* EX 66, at 255). Dr. Mertens reexamined claimant on October 26, 1998, and confirmed his diagnosis of neck-tongue syndrome (EX 71, at 269). He prescribed conservative treatment, primarily the wearing of a cervical collar, and indicated that no other treatment was appropriate (*id*. at 270). On November 20, 1998, claimant went back to Dr. Tilson, the orthopedic surgeon who had treated him for about 12 years primarily for his right knee condition, for an evaluation of his neck and upper back (EX 72). Dr. Tilson believed that claimant had reached maximum medical improvement in regard to the effects of the October 22, 1997 work injury, and that it was more likely than not that claimant's current medical complaints other than the carpal tunnel syndrome, including the neck-tongue syndrome, arose out of that injury (EX 72, at 278). He also recommended that claimant have carpal tunnel surgery (*id*. at 280). Dr. Tilson concluded that claimant could return to work but should avoid "climbing ladders or scaffolding, avoid working at heights or in situations where sudden arm weakness could cause a fall." (*Id*.) He did not examine claimant's knees at this examination, and his restrictions were solely in regard to his neck, back and shoulder (EX 145, at 1029).

The claimant next saw Dr. Craven on December 1, 1998. At that time, Dr. Craven placed him on work restrictions of "minimal pushing or pulling over 50 lbs, minimal lifting repetitively over 35 lbs. No climbing ladders or scaffolding. Permanent work restrictions." (EX 73, at 284) He referred claimant to neurosurgery for carpal tunnel syndrome. Nevertheless, clamant returned to work on December 2, 1998. Claimant had carpel tunnel surgery to his right hand on January 29, 1999, and to his left hand on April 9, 1999 (EX 77, at 291). It appears that claimant missed little or no work following the January 29th surgery, but missed almost two months following the April 9th operation (*see* CX 15).

He returned to work on June 5, 1999 and worked regularly through August 5, 1999 (*id*.). On that day, he was working as master consoleman, a job requiring virtually no physical exertion, when he got a bad attack of neck-tongue syndrome. The attack made him slur his speech and drool, and it apparently alarmed his co-workers (TR 176-77). He was told by the union Secretary that his condition created risks for himself and other workers, and he would not be permitted to return to work without a release to return to full duty from his doctor (TR 177-78, 185). Claimant has not been able to get such a release from his doctors. Rather, on July 31, 2000, Dr. Tilson prepared very strict limitations similar to those he imposed in the 1980's which

would clearly preclude the claimant from doing any job requiring even moderate physical labor, including all the longshoring jobs he had been doing since Dr. Tilson originally imposed these restrictions (*see* CX 18, at 151).

Claimant nevertheless managed to return to work, putting in full days on February 28 and March 1, 2001 (TR 187; CX 31, at 404). He stated that he believed Dr. Rosenbaum wrote a report which stated he could return to work (TR 187). But the only report in the record from Dr. Rosenbaum written at about that time, dated February 13, 2001 (EX 121), relates to whether the claimant has a vestibular abnormality (Dr. Rosenbaum stated that he did not, noting this was confirmed by Dr. Wilson, an ear specialist – *see* EX 120, 127)), and does not discuss whether claimant can return to work. However, Dr. Rosenbaum did write a comprehensive report on November 22, 2000 (EX 119), after an examination on that date. He concluded in that report that the claimant "could return to the same level of work he was doing [until August, 1999]." *(Id.* at 479) It is possible that this is the report the claimant submitted to the union which got him reinstated (*see* TR 187). Claimant testified that two days later a secretary at the union noted that Dr. Rosenbaum was not claimant's treating doctor, and told him she could not let him work unless his treating doctor authorized it (TR 188-89). According to Dr. Won, however, Claimant experienced "increased neck pain and a feeling of mini strokes . . ." during the two days he worked, which disabled him (EX 125, at 501), and he reached maximum medical improvement. In any event, Claimant has not worked since.

Marcella Karnes, claimant's girlfriend who has lived with him since February 1999, testified that the claimant's old injury to his right knee does not cause him any trouble (EX 144, at 981). Claimant still rides his motorcycles occasionally (*id.* at 973), does some welding in his garage (*id.* at 973), built a small trailer (*id.* at 977, 989-90), and helped put up a chain link fence (*id.* at 990-91). But they no longer have any exercise equipment (*id.* at 977-78), and most of the work on the house, such as painting, putting in gutters, and concrete work were either contracted out or done by friends (*id.* at 975-79). In addition, claimant does not do any work over his head (*id.* at 980-81).

Ms. Karnes stated that when she first met claimant, " he didn't hold his head all weird like he does now." (*Id.* at 983) Also, his neck, upper back and feet hurt all the time since the injury (*id.*), and "his face goes numb on one side." (*Id.* at 984). When this happens, claimant's speech is affected and he drools (*id.* at 985). But this happens with decreasing frequency (*id.* at 986).

On January 19, 2001, the Joint Coast Labor Relations Committee for the Oregon area – the joint labor-management committee which governs the ports in the area – adopted a policy for implementation of the Americans with Disabilities Act ("ADA"). Under this policy, disabled workers may request the Joint Port Labor Relations Committee "to determine whether reasonable accommodations exist which would enable the applicant or incumbent worker to enter or continue working in the longshore industry." (EX 138, at 547) As of the date of the hearing, not a single

request for accommodation had been filed (TR 73, 210).[3]

Employer has paid claimant compensation for temporary total disability, based on an average weekly wage of $1,037.04, for the periods October 23, 1997 - March 3, 1998, June 2-3, 1998 and August 6, 1999 - February 22, 2001. In addition, employer paid compensation for permanent partial disability from August 13, 2001 - November 26, 2001 at a rate of $615.00 a week (EX 6(e)).

Additional Medical Treatment

Claimant has been seen by numerous doctors in addition to those mentioned above. When Dr. Craven left Kaiser Permanente in 1999, Dr. Bergstrom became his primary care physician (EX 87, at 337). It appears that Dr. Bergstrom first saw the claimant on August 6, 1999, the day after he had the neck-tongue syndrome attack at work (*see* EX 80). Dr. Bergstram noted that claimant was on modified duty and "[a]pparently he is able to pick fairly light push-button type jobs." (*Id.* at 319) He recommended that claimant begin physical therapy with Robert Boney, whom he stated specializes in treating chronic musculoskeletol conditions like this . . . ," and continue working at light duty jobs (*id.* at 320-21). Dr. Bergstrom saw the claimant again on August 9, 1999. He stated that:

> He is in today because his employer, that is the secretary of the welfare division of the local longshore union feels that there is no appropriate modified duty that he is able to do as of last Friday, 08-06-99. Given his condition, I agree and was surprised that there is any appropriate duty that is safe. He will therefore be taken off work as of 08-06-99 for at least a month.

(EX 81, at 323) Dr. Bergstrom then wrote a comprehensive report discussing in depth claimant's status in regard to the October 22, 1997 accident at work. Significantly, Dr. Bergstrom stated that the physical therapy with Dr. Boney had not been successful (EX 87, at 339), and that a repeat MRI of the cervical area, which initially had been recommended by Dr. Rosenbaum, failed

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[3]It follows that the claimant has not filed a request for accommodation. That is unfortunate, since the claimant clearly is physically capable of performing many jobs on the docks. It would seem that one simple accommodation which could be afforded the claimant "without imposing an undue hardship on the Union or the Employers or without violating the *bona fide* seniority provisions of the PCLCA . . ." would be to give him the choice of remaining jobs, or have the dispatcher select a job which is within claimant's restrictions if one is still available, whenever his name comes up in the usual rotation. Unless the work at the ports has changed substantially since 1999, when claimant seemed to have little difficulty obtaining jobs he could perform, claimant should be able to work regularly given this very minor accommodation. In fact, this proposal seems so obvious that there must be something seriously wrong with it of which I am not aware for the parties not to have come up with it on their own.

to disclose surgically correctable pathology in general or any significant findings regarding the C-2 area in particular (*id.*). Dr. Bergstrom also stated that he agreed with the conclusions of Dr. Craven, Dr. Carter – a neurologist – and Dr. Rosenbaum that claimant's neck-tongue syndrome arose from the October 22, 1997 injury (*id.* at 339-40). He also diagnosed severe myofacial dysfunction or strain/sprain in the cervical and upper thoracic spine, also related to the October 22, 1997 injury (*id.* at 340).

Dr. Bergstrom believed claimant could not do any work in his present condition (*id.* at 341). He noted that claimant really wanted to return to longshore work. Dr. Bergstrom proposed that claimant undergo an examination by Dr. Delashaw, a professor of surgery at the Oregon Health Sciences University who specializes in skull-based neurosurgery, even though he did not believe claimant would benefit from surgery, because he believed Dr. Delashaw could offer a helpful opinion. He also recommended that two unusual forms of therapy – prolotherapy and neural therapy – be tried if Dr. Delashaw could not suggest other treatment (*id.* at 341-42). Dr. Bergstrom's report shows a clear understanding of claimant's condition and his deep concern in trying to help him improve and get back to work.

Claimant underwent neural therapy with Dr. Heitch on November 4 and again on November 8 (EX 89), November 19, November 22 and November 23, 1999 (EX 91). Neural therapy apparently consists of a series of injections directly into nerves (TR 178; EX 89). He also had prolotherapy, which consisted of injecting a dextrose and lidocaine solution into the laminae at C 3-6, with a physiatrist, Dr. Jacobs, on January 6, 2000 (TR 178; EX 95).

On November 9, 1999, claimant's primary care physician at Kaiser Permanente changed again, with Dr. Won taking over from Dr. Bergstrom, who was no longer with Kaiser Permanente (EX 141, at 873). Dr. Won examined claimant on that date (*see* EX 90). Dr. Won noted some improvement in claimant's cervical and thoracic condition following the first two neural therapy treatments, but no change in the neck-tongue syndrome. But when Dr. Won next saw the claimant on December 7, 1999, he stated that claimant did not see any improvement from the neural therapy (EX 92, at 356). Dr. Won stated that he "spoke with union representative Scott Shanel, and he reports that there is no modified work for the patient. Therefore the patient is not eligible for modified work at this time." (EX 92, at 357) On January 5, 2000, claimant started physical therapy again (EX 94; *see also* EX 97), and on January 6, in addition to the prolotherapy, Dr. Jacobs started claimant on a new medication, Neurontin, which he hoped would decease his neck pain (EX 95). Claimant also went for another neurology consultation, this time with Dr. Tahir (EX 96), who did not find any neurological or nerve root problems and ruled out surgery (*id*. at 370).

Claimant finally saw Dr. Delashaw[4] on February 11, 2000, (EX 99), and again on March 31, 2000 (EX 100). But Dr. Delashaw found no neurological pathology which would explain claimant's pain.

Claimant continued treatment with Dr. Won and Dr. Mertens. On May 23, 2000, Dr. Won suggested that the "patient get vocational guidance as he probably will not be able to return to his work as longshoreman." (EX 102, at 402) He ordered a physical capacities evaluation. On May 16, 2000, Dr. Mertens ordered a psychometric evaluation (EX 102, at 403 (b)). Accordingly, on June 1, 2000, claimant underwent a psychological assessment by a neuropsychologist, Dr. Horstman (EX 103a, b; EX 104b, at 409b). Dr. Horstman reported that claimant was not malingering but did somatize. She found that he was "in a lot of emotional pain as well as physical pain." (EX 103b, at 404d) She recommended that claimant be evaluated for anti-depressant medication (*id*. at 404c).

The physical capacities evaluation recommended by Dr. Won was conducted on June 12, 2000 (EX 105). It was noted that the test was valid and that claimant applied consistent effort. Based on the requirements of the job of longshoreman as reported by the claimant, the evaluation concluded that claimant could not meet the lifting requirements of that job. Claimant was found to be capable of lifting 55 pounds to shoulder level and 30 pounds overhead occasionally, and 35 pounds to shoulder level and 20 pounds overhead frequently, whereas claimant stated that a longshoreman must lift 100 pounds occasionally and 50 pounds frequently (EX 104, at 405, 408).

On June 22, 2000, claimant was examined by Dr. Gancher, who diagnosed a torticollis – "a bend in the neck . . . so that the head is held in less than straight ahead posture" (TR 38) – and gave claimant botox injections to weaken his overactive muscles and thus reduce involuntary contractions (EX 104b, at 409b-c; EX 108, at 422-23). On July 10, 2000, claimant was started on an antidepressant medication, Paxil (EX 105, at 412).

Dr. Won saw the claimant again on July 11, 2000. He noted that claimant reported no improvement from the botox injections administered on June 22, 2000. He stated that claimant had reached maximum medical improvement. For the first time since he became claimant's family physician, Dr. Won authorized claimant to return to work, stating that he "is put on modified work which is no lifting repetitively over 20 pounds . . . ." (EX 106). He then referred claimant to Dr. Tilson for what he called a closing examination. On July 27, 2000, Dr. Won recommended that claimant undergo vocational rehabilitation (EX 107).

Claimant returned to Dr. Tilson on July 31, 2000 (EX 108). In his report of that examination, Dr. Tilson reviewed medical reports by many of the specialists who had treated the claimant since October 22, 1997, and also conducted an orthopedic examination. He concluded

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[4]Claimant's referral to Dr. Delashaw apparently was delayed by a dispute over who was going to pay for Dr. Delashaw's examination (*see* EX 98, at 389).

that claimant has arthritis of the neck which will not improve. He also reiterated the restrictions he imposed back in 1985, and added two additional restrictions due to the October 22, 1997 injury – no work above shoulder level, and avoiding working at heights or in situations where sudden arm weakness could cause a fall (EX 108, at 428). He concluded, contrary to 1998, that claimant's condition was not yet medically stationary (*id. at* 426). He explained this change by stating that in 1998 he did not believe any further treatment was planned, whereas when he saw claimant in 2000 further treatment and evaluation were in progress (EX 145, at 1059). Nevertheless, Dr. Tilson did not believe that claimant's neck condition made him totally disabled (EX 145, at 1041), and he stated that claimant "needs to get a job and stop obsessing about his neck condition." (EX 108, at 425) Dr. Tilson stated that there is no reason claimant could not drive a car or ride a motorcycle providing they had proper mirrors (EX 145, at 1045-46).

On August 31, 2000, a medical management report noted that the claimant was doing much better emotionally since he started taking Paxil (DX 109, at 431), although a report a week later said just the opposite and the Paxil was discontinued (EX 114, at 435; EX 114a, at 454a). On August 29, 2000, claimant was given a very thorough examination by Dr. Grimm, a board-certified neurologist to whom he was referred by Dr. Grimm's bookkeeper, who claimant met while trying to sell her a camper (TR 185-86; EX 113; EX 146, at 1072). Dr. Grimm reviewed reports of MRIs and x-rays of claimant's cervical spine which he obtained from the claimant which showed diffuse osteodegenerative joint and disc disease (EX 113, at 448; EX 146, at 1086). Specifically, he noted herniated discs at C4-C6 and C6-C7; a bulging disc at C4-C5; disc protrusion at C3-C4, and foraminal narrowing (EX 113, at 448). He also found degenerative disc disease at T1-T5. As he succinctly put it, "[t]his is just an extremely damaged neck." (EX 146, at 1090) Dr. Grimm further diagnosed neck-tongue syndrome and inner ear damage resulting in positional vertigo due to the October 22, 1997 injury (*id.* at 449-50). He expressed great surprise at the conclusion of Dr. Delashaw that there were no neurological findings to explain claimant's problems (*id.* at 447), and suggested that a myelogram with CT be done for a definitive diagnosis (*id.* at 451). Finally, he agreed with Dr. Won that claimant had reached maximum medical improvement (*id.* at 451). Dr. Grimm concluded that, due to the combination of his neck injury and loss of balance due to the inner ear injury, claimant can no longer perform physical labor but would be limited to sedentary jobs (EX 146, at 1119, 1140). It should be pointed out that Dr. Grimm is the only doctor to find inner ear damage.

Dr. Rosenbaum, a neurologist who testified at the hearing as a witness for the employer, first examined the claimant on August 2, 1999, three days before claimant experienced the serious neck-tongue incident at work (TR 34; EX 79). He also reviewed virtually all of the medical evidence available at that time (*see* EX 79, at 298-303). Dr. Rosenbaum agreed with the diagnosis of neck-tongue syndrome which had been made by other doctors (TR 35). He described neck-tongue syndrome as:

> a condition . . . of tongue sensory change that occurs with certain neck movements. And it's attributed to irritation of a nerve, the second cervical nerve root, going through the neck which has connections to the tongue so that a

> movement of the neck that happens to irritate that nerve will make the tongue be numb. . . . [B]ecause of the numbness, the tongue may also be clumsy, as the speech may slur . . . . It tends to last for just a few seconds . . . ."

(TR 35-36) He went on to state that neck-tongue syndrome is neither disabling nor progressive (TR 36). He also diagnosed a slight torticollis (TR 38).

In his August 1999 report, Dr. Rosenbaum attributed the neck-tongue syndrome to the October 22, 1997 injury. But at the hearing he was less certain, pointing out that the claimant's neck-tongue symptoms did not begin until almost a year after the injury (TR 39). He also pointed out that neck-tongue syndrome can occur without injury (*id.*). But Dr. Rosenbaum never stated, in any of his reports (EX 79, 85, 115, 121) or in his testimony, that the neck-tongue syndrome was not caused by the October 22, 1997 injury.

Contrary to Dr. Grimm's conclusions, Dr. Rosenbaum did not find any inner ear damage or vestibular disturbance (TR 42). In fact, he recommended that claimant get his ears tested, and he stated that Dr. Wilson, an inner ear specialist, conducted appropriate tests and did not find any abnormalities (TR 43; *see also* EX 120, 127).

Dr. Rosenbaum concluded his August 2, 1999 report by recommending that a CT scan of claimant's upper cervical spine be performed in order to determine if there was pathology around the C-2 nerve root which could be responsible for claimant's neck-tongue condition. He expected that no such pathology would be demonstrated. Otherwise, be believed claimant had reached maximum improvement (EX 79, at 305; EX 85, at 333).

Dr. Rosenbaum wrote a supplemental report on October 5, 1999 (EX 85) based on a review of additional records – primarily Dr. Carter's March 25, 1999 report (EX 76). He reiterated his conclusions regarding claimant's neck-tongue syndrome, and stated that claimant should be able to return to work as suggested by Dr. Tilson in his November 20, 1998 report (EX 72, at 277-78).[5]

Further, as was noted earlier, Dr. Rosenbaum examined claimant for a second time on November 22, 2000 (EX 119).[6] He also reviewed the medical evidence developed since his August, 1999 examination. In his November 22, 2000 report, he stated that claimant's symptoms

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[5]Dr. Tilson stated that claimant could return to work on limited duty, and with no climbing ladders or working at heights.

[6]Dr. Rosenbaum's November 22, 2000 report is in evidence at both EX 115 and EX 119. Dr. Mertens's October 23, 2000 report apparently was supposed to be in the record as EX 115, since it is listed at that exhibit number on employer's Exhibit List. However, since Dr. Mertens was deposed in 2001 (EX 141), and the missing report was discussed by another physician in EX 121, it does not appear that the absence of the October 23, 2000 report from the record is material.

are persistent but perhaps somewhat better than in 1999 (EX 119, at 479). He stated that claimant's "only measurable evidence of impairment is his torticollis and abnormal neck rage of motion." (*Id.*) Further, he agreed with Dr. Tilson that claimant's neck-tongue syndrome does not cause objective impairment. He believed that claimant could return to the same level of work at which he was engaged in 1998, subject to the lifting restrictions in the physical capacities evaluation (*id.*).

Finally, Dr. Rosenbaum prepared a short report on February 13, 2001 (EX 121) commenting on Dr. Wilson's January 23, 2001, report (EX 120) which is consistent with the positions he had expressed earlier.

Based on his examination and review of claimant's medical records, Dr. Rosenbaum found no abnormal reflexes; that claimant was not a candidate for cervical surgery; that his knee did not interfere with working and does not need further treatment; and that claimant could work subject to the limitations in the physical capacity evaluation. Dr. Rosenbaum was a very credible witness. Moreover, he has outstanding educational and professional qualifications (*see* EX 151). His opinion is entitled to great weight.

On May 18, 2001, claimant underwent a psychiatric evaluation by Dr. Sjodin for a Social Security disability claim (EX 128). Dr. Sjodin concluded that "from a psychiatric perspective, he appears to be able to maintain regular attendance in the workplace."

Claimant testified at his deposition that even as a casual worker he often would be able to choose from the available jobs (EX 140, at 781). At the hearing, he initially testified just the opposite, that even as a B-registration longshoreman he could seldom choose which of the available jobs he would get. Rather, he said, jobs were assigned by the dispatcher (TR 169-71). But on cross-examination he admitted that he was often able to choose jobs (TR 229-30). Karl Lunde, a longshoreman who is the chairman of the Area Labor Relations Committee, and before that was the Chief Financial Officer/Recording Secretary for Local 8 – the person who runs the local – (TR 63-64), testified that B-registration longshoremen have virtually no choice of jobs (TR 67, 84-85). Mr. Lunde also testified that claimant is not eligible for the dock preference board, a listing of longshoremen for whom lighter work is made available, because he does not meet the requirements of 55 years of age and 25 years as a longshoreman (TR 71). Mr. Lunde also testified that the union does not require an injured worker to get a release from his doctor before returning to work; if the worker says he can work he will be assigned work (TR 91). Mr. Lunde stated that at some point an employer may check to see if the worker has a medical release (*id.*). Interestingly, Scott Munger, the Director of Labor Relations of the Pacific Maritime Association for the Oregon area, a position for the employers which is almost a mirror image of Mr. Lunde's (TR 205-06), testified inconsistently with Mr. Lunde. Mr. Munger stated that the employers do not require a worker to be 55 years of age and have 25 years experience as a longshoreman to be placed on the dock preference board (TR 212-13). Mr. Munger also testified that employers do not check to see if injured longshoremen have releases from their doctors before they return to work (TR 213-14). He said if there is any such requirement it is a union

requirement, not a management requirement (TR 214). Another witness, Jan Schuette, Operational Manager for the employer in this case, testified that SSA does not need or see medical releases before an injured longshoreman can return to work (TR 218-19). But he stated that SSA would expect that the worker would be able to do his job (TR 220).

It should be noted that regardless of what the actual procedure was supposed to be, claimant appears to have had little trouble getting assigned to jobs which he was physically capable of performing, since he worked regularly (other than taking time off to recuperate from carpal tunnel surgery) from December 2, 1998 to August 5, 1999, in jobs which he categorized as relatively light duty, such as master console (TR 163-64), basic longshoreman (TR 165), switchman and loci driver (TR 167-68).

Dr. Won is a board-certified specialist in family medicine for Kaiser Permanente (EX 141, at 872). He specializes in treating workers with occupational injuries (*id.*). When he started treating the claimant on November 9, 1999, claimant's neck-tongue syndrome was severe to the point that he was drooling (*id.* at 875). Claimant also was experiencing "mini-strokes" at least once every day (*id.* at 877). He concurred in the results of the physical capacities test by Health South which concluded that claimant could do medium to heavy lifting but could not work as a longshoreman because that job requires very heavy labor (*id.* at 884). He further noted that he does not believe it is unsafe for claimant to drive (*id.* at 893). He believes that claimant can work, but cannot work as a longshoreman because no jobs are available for a longshoreman with physical restrictions (*id.*).

Dr. Mertens, a board-certified neurologist with Kaiser Permanente (EX 142, at 912), was deposed on September 20, 2001. He diagnosed neck-tongue syndrome as one of claimant's problems (*id.* at 915), but could not say whether it was caused by the October 1997 incident at work (*id.* at 917). Further, he stated that neck-tongue syndrome is inconvenient but not disabling (*id.*), and surgery is never warranted to treat it (*id.* at 922).

Vocational Evidence

Both parties presented testimony from vocational experts at the hearing. Frank Huckfeldt, a vocational counselor, submitted a report dated November 19, 2001 (CX 43) which was based on an assessment interview with the claimant on October 24, 2001. In preparing his report, Mr. Huckfeldt apparently reviewed some of the medical reports generated since April 27, 1997; the transcripts of depositions of the claimant, Mr. Lunde, and Drs. Mertens, Tilson and Won; and claimant's work experience and earnings records. However, he does not mention reviewing medical records from Drs. Craven, Bergstrom, Harrison, Carter, Delashaw, Heitch, Tahir, Jacobs, Gancher or Rosenbaum. He cited Dr. Tilson's restrictions from 1986 and 1997-98 (*id.* at 6), as well as Dr. Won and Dr. Grimm's bleak conclusions that the claimant's injuries will preclude him from employment. Based on this evidence, he concluded that claimant "is not capable of working in the competitive labor market at this time, due to the residuals from his physical disabilities, without provision of vocational assistance services." (*Id.* At 454). He testified that Dr. Sjodin's

psychiatric examination, in which she concluded that, from a psychiatric standpoint, claimant should be able to work regularly, actually supported his opinion. He stated that Dr. Sjodin concluded that chronic pain affects the claimant's ability to perform job-related functions, and implied that she found claimant to have "borderline intellectual functioning" (TR 110-11). But he admitted that he was unaware of any psychiatrist's or psychologist's diagnosis that the claimant cannot work (TR 118). Mr. Huckfildt based his understanding of the duties of a longshoreman on the *Dictionary of Occupational Titles* ("*DOT*), which states that a longshoreman must be able to exert 100 pounds of force occasionally, 50 pounds frequently and 20 pounds constantly (TR 129-30).

Another vocational rehabilitation counselor, Roy Katzen, testified for the employer. Mr. Katzen wrote a report dated November 9, 2001 (EX 153) in which he assessed claimant's ability to work and also prepared an extensive labor market survey dated November 13, 2001. In preparation for his report he interviewed and tested the claimant, obtained his work history, performed a transferable skills analysis, explored occupational alternatives, and reviewed most of the medical evidence in the record (*id.* at 1-2; TR 248). It was Mr. Katzen's opinion that the claimant could perform jobs requiring medium or even medium to heavy labor, including numerous jobs that a longshoreman would do (EX 153, at 17-18; TR 248-49). Mr. Katzen testified that the *DOT*'s description of Longshoreman 1 and 2 are very general, encompassing numerous specific jobs with varying requirements (TR 248-49), and claimant could do many longshore jobs despite his lifting restrictions.

Among other things, Mr. Katzen relied on the Physical Capacities Evaluation by HealthSouth Rehabilitation Center (EX 104) conducted on June 12, 2000. The report states that the claimant fully cooperated and showed good effort (*id.* at 405). Therefore, the results should be reliable. According to the test results, claimant can lift and carry in the medium/heavy category (*id.*). He can occasionally lift 55 pounds from the floor to his shoulder, and 35 pounds frequently. He can lift 30 pounds above his shoulder occasionally, and 20 pounds frequently. He can carry 50 pounds 100 feet occasionally, and 35 pounds frequently. He can push 70 pounds occasionally and 40 pounds frequently, and can pull 75 pounds occasionally and 45 pounds frequently. It was also determined that claimant could perform all of the following non-material handling activities frequently: sitting, standing, walking, climbing stairs, trunk bending (sustained), overhead reaching (sustained), crawling (10 feet), squatting, kneeling (sustained), stooping, crouching (sustained squat), ladder climbing (repetitive), trunk twisting, forward reaching (repetitive), and pushing/pulling. His aerobic capacity was rated as fair, and he had a severe restriction in his cervical range of motion.

HealthSouth concluded that the claimant "would not be able to return to work in his job as a longshoreman because he could not handle the lifting requirements of the job." (*Id.)* But this conclusion was based on claimant's reporting to HealthSouth that longshoremen had to lift, pull and push 100 pounds occasionally and 50 pounds frequently. In addition, it was determined that "he would be able to tolerate material handling and lifting [as described above] for an 8 hour work day." (*Id.*)

Mr. Katzen also considered Dr. Tilson's 1985 and 2000 restrictions, and Dr. Won's deposition testimony, perceptively noting that, taken together, these evaluations present a confusing picture (EX 153, at p.5). Accordingly, Mr. Katzen used both "a *light medium* range based on the 35 pound lifting restriction [Dr. Tilson's 1985 restriction] and then a *medium-heavy* range based on the functional capacity testing . . . ." (*Id.*) In additional to the physical assessments, Mr. Katzen considered psychological/psychiatric assessments by Dwight Milne, a nurse and social worker, and Drs. Horstman and Sjodin, and tests he conducted to determine claimant's basic reading, math and non-verbal reasoning skills which rated as high school, sixth grade and average levels respectively (*id.* at 9-10). Finally, he pointed out numerous transferrable skills including use of hand tools, welding, vehicle operation and an ability to communicate with co-workers (*id.* at 10-11). Factoring in all of this, Mr. Katzan came up with a list of 59 occupations in the light duty range and 21 additional occupations in the medium duty range which the claimant should be capable of performing (*id.* at 12-13). He also listed the following longshore jobs that claimant could perform even with the 35 pound lifting restriction: Dockman, Crane Chaser, Hatch Tender, Lift Truck Driver, Hostler Driver, Utility Lift, Heavy Lift, Clerk and Master Console Operator (*id.* at 13-14). Moreover, Mr. Katzen reviewed daily dispatch records and found that some of these jobs were available to B-registration longshoremen and casuals on most days, which is consistent with claimant's work experience.

Mr. Katzen also performed a labor market survey which identified numerous jobs falling within Dr. Tilson's restrictions in three areas: Parking Lot Cashier/Attendant, Security Guard/Gate Guard and Light Production/Assembly (*id.* at 16).

Mr. Katzen's report was far more complete than Mr. Huckfeldt's. He considered much more evidence, and carefully explained his conclusions. I give his opinion much greater weight than Mr. Huckfeldt's. Accordingly, I find that there are numerous jobs which the claimant is capable of performing, including numerous longshore jobs.

Nature and Extent of Disability

This is one of the most perplexing cases I have heard in my 23 years as an administrative law judge at the Department of Labor, which explains, but does not excuse, the length of time it has taken me to write this decision. First, claimant was clearly temporarily and totally disabled from the date of injury until March 3, 1998, when Dr. Craven would have returned claimant to work but for his belief that no modified duty jobs were available for longshoremen. Dr. Craven's restrictions were "minimal stooping, twisting, bending. No pushing or pulling over 50 lbs, No lifting repetitively over 25 lbs" (EX 35, at 157). On March 31, 1998, Dr. Craven raised claimant's pushing and pulling limits to 60 pounds, and his lifting limit to 30 pounds, and again stated he would return claimant to work if light duty jobs were available (EX 41, at 181). Then on May 1, 1998, despite noting only minimal improvement, Dr. Craven returned claimant to regular duty since modified duty was unavailable (EX 48, at 208). Although employer argues that claimant was capable of performing at least the position of master console operator as of March 3, 1998, since he was kept off work by his treating physician through May 1, and there is no indication in

the record of how often claimant would have been able to work in those two months if the only job he was capable of performing was that of master console operator, I find that he was temporarily totally disabled through May 1, 1998.

Claimant returned to work on May 4, 1998, without restriction, performing many different jobs (*see* EX 8, at 28). Over time, claimant identified the jobs he was able to perform and those which he could not, and sought the jobs he could perform when his plug was picked (TR 163). Claimant worked regularly, averaging 32.5 hours a week from May 4 through September 28, 1998, when he stopped reporting for work. Dr. Craven saw claimant the next day, September 29th, and did not suggest that the claimant stop working. He did not reinstate claimant's restrictions and take him off work – again, based on the belief there was no modified duty available as a longshoreman – until October 19th. But claimant's diary indicates that his symptoms increased at the end of September (CX 30, at 388), and his neck-tongue syndrome was first diagnosed on October 2nd. Accordingly, it appears reasonable that claimant stopped working after September 28th, 1998 despite the fact that Dr. Craven did not take him off work until October 19th.

Although claimant worked regularly from May 4 through September 28, 1998, the employer concedes that claimant suffered a loss of wage-earning capacity during that period. When his earnings from May 4 through September 28 are added, claimant earned $19,049.59. Divided by the number of weeks this represents (21 2/7), it works out that claimant earned $894.94 a week. Employer then notes that this sum has to be adjusted downward by four percent to reduce the post-injury wages to the pre-injury basis. When the math is completed, claimant's post-injury wage-earning capacity for the period May 4 to September 28, 1998 is $859.14 a week. When compared to claimant's average weekly wage of $1037.04 (*see infra*), claimant incurred a weekly loss of wage-earning capacity of $177.90 during this period.

Claimant was then temporarily totally disabled from September 29, 1998 through December 1, 1998. He returned to work on December 2, 1998 following an examination by Dr. Craven the previously day, and worked regularly (other than two periods of disability following carpal tunnel surgery) averaging over 35 hours a week until August 5, 1999, when he suffered the bad neck-tongue attack. During this period, which equals 35 2/7 weeks, claimant earned $31,655.72. But claimant was off work from April 9 through June 1, 1999 as a result of carpal tunnel surgery (EX 77-78), so this period of 7 5/7 weeks must be deducted from the 35 2/7 weeks to determine how many weeks claimant actually worked from December 2, 1998 through August 5, 1999. This comes out to 27 4/7 (or 27.572) weeks. When divided into $31,655.72, claimant earned $1148.11 per week. When reduced by 4% due to the 1997 wage increase, this total of $1102.19 still exceeds claimant's average weekly wage. Accordingly, claimant is not entitled to any compensation for temporary partial disability for the period from December 2, 1998 through August 5, 1999.

Claimant was then temporarily totally disabled as a result of the neck-tongue attack on August 5, 1999. As was pointed out above Dr. Bergstrom, who had just become claimant's family physician, immediately took him off of work for at least a month. In a report of October 7, 1999, he reiterated that the claimant could not do any work at that time. Dr. Bergstrom initiated referrals to other physicians and recommended several forms of unusual treatment in the hopes of improving claimant's condition. When Dr. Won took over claimant's treatment from Dr. Bergstrom, he found claimant's neck-tongue syndrome was highly symptomatic. Accordingly, he did not release him to return to work.[7] Instead, he ordered more physical therapy and other treatment. On May 23, 2000, Dr. Won referred the claimant for the physical capacities evaluation performed by HealthSouth on June12, 2000, and stated that the "[p]atient would not be eligible for any type of modified work until the physical capacity evaluation." (EX 102, at 402). It was after receiving the results of the physical capacities evaluation that, on July 11, 2000, he authorized claimant to return to work subject to the limitation of not lifting over 20 pounds repetitively cited in note 7. Three weeks later, Dr. Tilson confirmed that the claimant could return to work subject to restrictions. Accordingly, I find that the claimant was temporarily totally disabled from August 6, 1999, through July 11, 2000.

This leaves the period from July 12, 2000 through the present. Claimant's inability to work since July 12, 2000 is the really unusual aspect of this case. Claimant has worked only two days since he was released to return to work with restrictions – February 28 and March 1, 2001 – when due to a mix-up over who was his treating doctor the union briefly let him work. The evidence establishes that since July 12, 2000, the claimant was physically capable of returning to his usual job as he was performing it from December 2, 1998 to August 5, 1999, and he states he wants to do so; but his own union will not let him. The union's refusal to let him work is based on policies which either do not exist or are poorly understood and inconsistently – if ever, other than in this case – enforced. Further, claimant has not attempted to make use of new and untested procedures in the port, adopted in response to the Americans with Disabilities Act, which seem perfectly suited to getting him back to work (*see* note 3 *supra*). Finally, the labor market survey by Mr. Katzen clearly establishes that there are numerous jobs in many different occupations which are suitable for the claimant under even the most restrictive medical limitations and are readily available, but the claimant is reluctant to undertake such employment for fear of losing his hard-earned union card.

The question is, how do all of these factors affect the claimant's entitlement to compensation under the Act since July 12, 2000? Between 1985 and 2000, claimant's work restrictions barely changed. In 2000, Dr. Tilson added two restrictions in response to claimant's

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[7]Dr. Won also pointed out that he talked to the union Secretary and was informed there was no light duty work as a longshoreman. But it appears that he would not have released the claimant to work at that time in any event. The union's position had not changed when, on July 11, 2000, Dr. Won released the claimant to work subject to the limitation that he does not repetitively lift over 20 pounds. *See* EX 106, at 415.

upper body injuries to those he imposed in 1985 due to claimant's knee injuries – no work above shoulder level, and avoiding working at heights or in situations where sudden arm weakness could cause a fall. Yet according to the physical capacities evaluation, claimant appears less restricted in 2000 than he was in 1985; and Dr. Rosenbaum, in 2001, believed claimant could perform the same jobs he was doing in 1998. In short, despite the neck-tongue syndrome, which none of the doctors believe to be disabling, claimant is no more restricted in his ability to work now than he was prior to the injury at work on October 22, 1997. The only significant change in claimant's circumstances is that his union will not let him work unless he can work without limitations so that he is available for any longshore job at the port, whereas prior to August 6, 1999, the union had not imposed such a restriction.

Under these conditions, I cannot see how SSA can be liable for benefits for either temporary or permanent total disability resulting from claimant's failure to work subsequent to July 12, 2000. Physically, claimant is capable of performing the work he did from December 2, 1998 to August 5, 1999, during which time his earnings exceeded his pre-injury earnings. To the extent that the claimant cannot work due to conditions first imposed on him in 2000 by his union, which would have been just as applicable to his previous periods of employment but were not imposed on him at those times, that is not the result of the work-related injury. Insisting that, now, claimant cannot work at all as a longshoreman unless he is physically capable of performing all longshore jobs when previously he worked regularly performing only those jobs he was physically capable of performing is arbitrary and unreasonable, particularly since virtually all of the restrictions relate back to a mid-1985 knee injury which has not given the claimant trouble since and has never prevented him from doing his longshore work. Requiring the employer to pay claimant compensation when the only reason he is not working at his pre-injury job is the arbitrary action taken by his own union would be irrational.

I understand that this ruling places the claimant in a difficult position, and I am not unsympathetic. For the claimant has suffered an injury which has produced some physical limitations as well as some unpleasant symptoms, and although he says he would like to return to work, he has not been permitted to do so. But the Act does not require the employer to pay the claimant compensation when, despite these limitations and unpleasant symptoms he is physically capable of performing his usual work, and the dispute precluding the claimant from working is between him and his union. Further, as I pointed out above, the claimant has not exhausted all of the options available to him to have this impasse resolved.

I find that the claimant reached maximum medical improvement on November 22, 2000, when he was examined by Dr. Rosenbaum. Although Dr. Won concluded that claimant reached maximum medical improvement on July 11, 2000 when he released the claimant to return to work, Claimant was still undergoing treatment in the hope that his condition would improve through the summer of 2000. As late as July 31, 2000, Dr. Tilson, despite releasing the claimant to return to work, stated, contrary to his earlier opinion, that claimant had not yet reached maximum medical improvement. At his November 22, 2000 examination, Dr. Rosenbaum concluded that all of claimant's symptoms were medically stationary (EX 119, at 479). Moreover,

it appears that by that date claimant was no longer undergoing treatment with an eye towards improvement. Accordingly, I find that claimant's condition became permanent on November 22, 2000.

Nevertheless, since claimant has failed to prove that the October 22, 1997 injury has permanently impaired his wage-earning capacity, he is not entitled to any compensation for permanent partial or permanent total disability.

Average Weekly Wage

The parties agree that claimant's average weekly wage must be calculated under §10(c) of the Act since claimant did not work most of the year prior to his injury, precluding the application of §10(a), and neither party has submitted the wage records of comparable workers to be used under §10(b). In fact, applying §10(b) would have been the most reasonable approach to take here, considering that, in the year prior to his injury, claimant moved up in seniority from a casual to a B-registration longshoreman which more than doubled his income, but then only worked for eight weeks as a B-registration worker due to another work-related injury.

Nevertheless, the parties have taken diametrically different approaches to calculating claimant's average weekly wage under §10(c). Claimant contends that his average weekly wage should be calculated by taking his earnings in the 6.71 weeks he was a B-registration worker prior to having to take off work after injuring his rotator cuff – March 1 - April 16, 1997 – a total of $7,770.05, and dividing that by 6.71, producing weekly earnings of $1,157.98; adding the dollar per hour increase that went into effect on June 28, 1997, providing an additional $46.32 per week, for a total of $1,204.30; and adding 10 days of vacation pay and 15 days of holiday pay, providing another $98.80 per week; for a total average weekly wage of $1303.10.

Employer objects to virtually every aspect of claimant's calculations. First, employer points out that the claimant's projected annual earnings which form the basis of his calculation of a $1,303.10 average weekly wage – $67,759.60 (*Claimant's Closing Argument* at 4), is unduly high, exceeding the 1997 earnings for the average A-registration longshoreman, the highest level of seniority in Portland (*see* EX 9, at 31). This is a compelling argument.

Second, employer argues that the 6.71 week period used by the claimant to calculate his average weekly wage is not of sufficient duration to form the basis for calculating a full year's wages. Employer contends that those periods appear to have been periods of high employment when compared to the B-registration workers' average yearly wages of $45,654 for 1997, producing an average wage of only $877.96 per week. Moreover, claimant's wage records for the year prior to the injury show great variation from week to week. Even after claimant became a B-registration longshoreman his weekly work hours varied from as few as 32 to as many as 52.5, which is reflected in his earnings of $729.60 and $1,363.77 in those respective weeks. Employer's objection to basing claimant's average weekly wage on his earnings over so short a time is persuasive.

Third, employer contends that adding the $1.00 an hour raise which went into effect on June 28, 1997 to all of claimant's projected earnings for the period October 22, 1996 to October 22, 1997 is inappropriate. A claimant's average weekly wage should be based on what he actually earned in his position in the year prior to the injury, not on how much he would have earned had a wage increase which he received during that year gone into effect at the beginning of that year. Calculating a claimant's average weekly wage solely on his wage rate subsequent to receiving a wage increase in the year prior to an injury is appropriate where the claimant is earning significantly more, as occurs where the claimant has received a promotion or changed to a higher paying position. In fact, that is the approach both parties have taken in this case, since both base their respective average weekly wage calculations on claimant's earnings as a B-registration longshoreman, a position he did not move to until March 1997, rather than on his earnings throughout the year prior to the injury, most of which were from claimant's much lower paying employment as a casual longshoremen.

Most employees get a small raise of some sort (cost of living, length of service, etc.) as often a once a year, and under the claimant's theory a claimant's average weekly wage would almost never be calculated solely on an employee's actual earnings in the year prior to an injury even where the employee worked in the same job throughout that year, in effect nullifying §10(a). That is not how the Act is supposed to work; determining a claimant's average weekly wage under §10(a) is supposed to be the norm. Regardless, even if the claimant is correct in arguing that only the higher wage rate should be used, it would have no effect on my finding regarding claimant's average weekly wage in this case (*see infra*).

Fourth, employer questions claimant's addition of vacation and holiday pay received in the year after claimant's injury to his average weekly wage based on his earnings in the year prior to the injury, alleging that these are speculative. Employer's objections are well taken. Not only are these speculative, but vacation pay must be considered as income in the year it is received, not in the year it is earned.[8] *See Sproul v. Stevedoring Services of America*, 25 BRBS 100 (1991). In regard to holiday pay, claimant would have received it a few weeks after the holiday, apparently even if he was out of work due to an injury (CX 6, at 19). So if he earned holiday pay while employed as a B-registration longshoreman in the year prior to his injury it would have been reflected in his earnings for the year.

Instead of claimant's projections based on only a few weeks of earnings, employer argues that claimant's average weekly wage should be calculated based on all of his earnings in the year before his injury, earned as either a casual or B-registration worker. Nevertheless, employer is willing to accept a much higher average weekly wage of $1,037.04 which is clearly based only on claimant's wages as a B-registration longshoreman. Claimant had proposed this figure as his average weekly wage earlier in this claim and employer has used it in paying compensation to the

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[8]For example, vacation pay received in 1998 would be based on a longshoreman's work record in 1997.

claimant.

This case just screams out for the application of §10(b) based on the earnings of other B-registration longshoremen with seniority similar to the claimant's. For some reason, neither party took this approach. Instead of relying on concrete data which would have been relatively easy to apply, claimant proposed some esoteric, complex scheme and employer argued for the application of an artificially low figure and then abandoned it for a figure proposed by claimant years ago which seems to have no basis in the record.

In light of the record before me – which clearly is incomplete – it appears that the most reasonable way to determine claimant's average weekly wage is to base it on the average yearly wages of B-registration workers in claimant's union local (EX 9). This method is far from perfect. For one thing, the records in evidence are based on calendar years, not the precise 365 days prior to claimant's October 22, 1997 injury. But using the earnings for calendar year 1997 closely approximates the year prior to the injury. Second, the list of average wages of union members includes the wages of "all registered men working one or more hours during a year." (*Id.* at 31) There is no breakdown in the record of the number of hours worked by each of the 63 B-registration workers. Accordingly, this average may be artificially low if it includes a number of workers who worked only a limited number of hours in 1997. Conversely, if less likely, it may be inflated if it reflects the earnings of workers who worked an inordinately high number of hours.

Nevertheless, this list of average earnings for B-registration longshoremen is the best data available. Based on the average wages of all 63 B-registration longshoremen who worked in 1997, dividing the average yearly earnings of $45,654 by 52 provides an average weekly wage of $877.96. However, as noted above, employer has agreed to apply an average weekly wage of $1,037.04. Since employer's figure, which apparently relies on evidence not in the record, is more favorable to the claimant than the figure I arrived at based on the best information made available to me, I accept it as claimant's average weekly wage in this case.

Intervenor

Under the terms of the ILWU-PMA Welfare Plan ("the Plan"), the Plan is entitled to be reimbursed for any disability benefits paid to a longshoreman for an injury which is covered by the Act. Under §17 of the Act, a lien in favor of the Plan should be imposed in the amount of such payments received by a claimant. As of October 19, 2001, the Plan had paid claimant $20,910 in disability benefits (*See* IX 1-D). Accordingly, the Plan is entitled to a lien on any compensation to be paid to the claimant as a result of this decision up to the amount of disability payments it has paid.

Although the Plan also asserts a right to be reimbursed by the employer for any medical benefits paid to the claimant, it has not presented any evidence that it has paid medical benefits to the claimant. Thus, there is no basis to order the employer to reimburse the Plan for medical benefits.

ORDER

IT IS ORDERED that:

1. The employer shall pay to the claimant:

a. Compensation for temporary total disability from October 23, 1997 through May 1, 1998, September 29, 1998 through December 1, 1998 and August 6, 1999 through July 11, 2000, based on an average weekly wage of $1,037.04.

b. Compensation for temporary partial disability from May 2, 1998 through September 28, 1998 based on a loss of wage-earning capacity of $177.90 per week.

c. Medical benefits for the injuries sustained by the claimant on October 22, 1997.

Credit shall be given for all previous payments of compensation and medical benefits. Interest shall be paid on all unpaid compensation, if any, from the date due until paid in accordance with 28 U.S.C. §1961(a).

2. ILWU-PMA Welfare Plan shall have a lien on any payments of compensation which would otherwise be paid to the claimant until it has been reimbursed for the disability payments it has paid to the claimant.

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JEFFREY TURECK
Administrative Law Judge